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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 622

MATTIE BRADEY, AS ADMINISTRATRIX OF THE ESTATE OF MARION THOMAS BRADEY, DECEASED, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York (R. 18) is reported in 1945 A. M. C. 777. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 30–32) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 2, 1945 (R. 33). The

petition for a writ of certiorari was filed on November 23, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether libellant, as administratrix of a deceased enlisted man in the United States Naval Reserve who was killed in a collision between the Navy destroyer on which he served and a Liberty ship, owned and operated by the United States, may sue the United States in admiralty under a state death statute for damages for the alleged wrongful death, the administratrix as mother of the deceased Navy fireman having received, with her husband, all pensions, death benefits, and other benefits provided by law for surviving parents.

STATUTES INVOLVED

The statutory provisions, which are here primarily pertinent, are set forth in the Appendix, *infra,* pp. 10–12.

STATEMENT

This action was instituted by libel filed on June 22, 1944 (R. 1, 2–12) which set forth alleged causes of action under the Virginia death statute (R. 10–12) for the death of Marion Bradey resulting from injuries received by him while serving as Navy fireman, First Class, U. S. N. R., in the fire room of the destroyer *Parrott* (R. 15). The

injuries occurred in a collision between the *Parrott* and the Liberty ship *John Morton* in Norfolk harbor on May 2, 1944 (R. 3–4). The libel was based in the alternative on consent to suit by the United States evidenced by the Public Vessels Act, 43 Stat. 1112, 46 U. S. C. 781–790, or the Suits in Admiralty Act, 41 Stat. 525, 46 U. S. C. 741–752.[1]

Exceptions and exceptive allegations to the libel asserting lack of jurisdiction in the district court were filed on behalf of the United States (R. 12–14). After the filing of the exceptions, the facts were stipulated (R. 15–17). The stipulation discloses that the destroyer *Parrott*, an armed vessel of the United States Navy, was proceeding to sea as part of a Naval task force at the time of the collision in Norfolk harbor (R. 15). The *John Morton*, a Liberty type cargo vessel, manned by a civilian crew but owned and operated by the United States,[2] was, at the time of the collision, partially loaded with materials of war for the United States Army in the European theater and was proceeding to a different pier to complete its loading of Army cargo including tanks, tools,

[1] The libel also named the Luckenbach Steamship, Inc., agent for the *John Morton* as a respondent (R. 8–9). This phase of the suit is not here presented.

[2] The *John Morton* had been allocated by the War Shipping Administration to the War Department for the purpose of carrying munitions of war for the United States Army (R. 16).

guns, and other military supplies and materials (R. 15–17). While proceeding from its dock, the *Parrott* was rammed by the *John Morton* and the destroyer's side plates were fractured (R. 3–4). The libel alleged negligence in the operation of the *John Morton* and, for present purposes, such negligence may be assumed.

Petitioner and her husband, as surviving parents of the deceased, were and are entitled to all pension rights and other benefits provided by the United States by statutes and regulations governing Navy personnel (R. 15). Such pension and death benefits have been and are now being paid to petitioner and her husband (R. 15).

On the pleadings and the stipulation of facts, the District Court for the Southern District of New York sustained the exceptions and dismissed the libel (R. 18–19). On appeal, the Circuit Court of Appeals for the Second Circuit affirmed, relying upon its prior decision in *Dobson* v. *United States*, 27 F. 2d 807, certiorari denied, 278 U. S. 653. It held that the *John Morton* was a public vessel and that because of the compensation elsewhere provided for members of the armed forces, they must be deemed to be excluded from the protection of the Public Vessels Act.

ARGUMENT

1. As the court below held, it is clear that the *John Morton* was a public vessel of the United States at the time the collision occurred. *The*

Western Maid, 257 U. S. 419; *United States* v. *City of New York,* 8 F. 2d 270 (S. D. N. Y.); *The Norman Bridge,* 290 Fed. 575 (S. D. N. Y.), modified on different grounds, 13 F. 2d 435 (C. C. A. 2). In *The Western Maid,* which involved a vessel owned by the United States and assigned to the War Department for transportation of foodstuffs to Europe, this Court said (pp. 431–432):

> It is suggested that the *Western Maid* was a merchant vessel at the time of the collision, but the fact that the food was to be paid for and the other details adverted to in argument cannot disguise the obvious truth, that she was engaged in a public service that was one of the constituents of our activity in the war and its sequel and that had no more to do with ordinary merchandising than if she had carried a regiment of troops.

The court below commented on the foregoing cases and their relationship to that at bar in the following manner (R. 31):

> Those decisions concerned the carriage of food to Europe, or of gold from Europe to pay for food already delivered, after the first World War; and a far more plausible argument could be made that the ships performing such services were "merchant" vessels than can be made in the case of a ship like the *John Morton,* bound for a theatre of war, *flagrante bello,* with a cargo of coal and munitions, consigned to the Army.

2. The decision of the court below, rested on the prior decision of the same court in *Dobson* v. *United States*, 27 F. 2d 807, certiorari denied, 278 U. S. 653, is put upon the ground that Congress, in enacting the Public Vessels Act, did not reveal an intention, in the absence of specific language, to subject the United States to suit as a result of an injury caused a member of the armed forces by a public vessel where there existed a comprehensive system for compensating such persons for injuries or losses. There is such a compensation scheme here, for systematic pensions and death benefits are provided (38 U. S. C. 472, 472b, 701–733); six months' pay is immediately allowed to the qualified relative, in this case the surviving parents (34 U. S. C. 943); both officers and men are reimbursed for personal property lost or damaged by operations of war, ship-wreck, or other marine disaster (34 U. S. C. 984–989); war risk insurance and national service life insurance are available to personnel who qualify (38 U. S. C. 511, *et seq.*, 801–818); and wartime allowances are provided for dependents (37 U. S. C. 201–221). An award in this case would, in the light of these provisions, require that the United States twice compensate an injured member of the armed forces.[3]

[3] Petitioner (Pet. 18–21) apparently misapprehends the manner in which the court below relied upon the Act of March 24, 1943 (57 Stat. 45). That Act declared that officers and members of crews employed by the War Shipping Ad-

We submit that the compensation provisions contained in the above-described statutory scheme are exclusive and that military personnel lack power to maintain a suit against the United States founded on an injury already within the contemplation of one or another of the enactments. The view has been expressed that any other conclusion would be contrary to public policy (*Dobson* v. *United States, supra; O'Neal* v. *United States,* 11 F. 2d 869 (E. D. N. Y.), affirmed without opinion, 11 F. 2d 871 (C. C. A. 2)), and there is no reason to assume that that policy does not prevail simply because the cause of injury is a publicly owned ship other than the one on which the injured person was a crew member (cf. Pet. 6, 17, 22–23). Moreover, no different result follows if it be assumed that the *John Morton* could be classified at the time of the collision as a merchant vessel under the Suits in Admiralty Act, since the exclusive nature of the remedy afforded by the general compensatory scheme provided for members of the armed forces would likewise preclude recovery. *Posey* v. *Tennessee Valley Authority,* 93 F. 2d 726 (C. C. A. 5); *Sandoval* v. *Davis,* 278 Fed. 968, 973,

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ministration have all rights in respect to injuries or death that would obtain in respect of privately owned or operated vessels. It also specifically removed all such seamen from the coverage of the United States Employees Compensation Act. The obvious reliance put upon that Act was that Congress did not desire to confer two benefits or remedies for the same injury and that it considered that the provision made by the compensation statute would control unless it was specifically made inapplicable.

affirmed, 288 Fed. 56; *Seidel* v. *Director General of Railroads,* 149 La. 414; *Moon* v. *Hines,* 205 Ala. 355.

Petitioner relies upon the decision of this Court in *Dahn* v. *Davis,* 258 U. S. 421, for the proposition that an employee of the United States can recover for a tortious injury, consent to suit having been given, even if compensation is otherwise available. But that case stands only for the proposition that an election to take benefits bars the tort action. As shown by the stipulation here, petitioner and her husband as surviving parents are receiving all benefits and payments to which they are by law entitled. In the circumstances of this case, such benefits include the six months' gratuity under 34 U. S. C. 943, and the monthly compensation for death resulting from injury in the line of duty under 38 U. S. C. 472, 472b. No disavowal of these, or other payments such as the insurance benefits mentioned above, has been made. On the contrary, petitioner asserts a right to $15,000 damages, the maximum allowed by the Virginia death statute relied on (R. 11), *in addition* to statutory benefits and compensation. We submit that the receipt of statutory payments constitutes a bar to this action, even if it be admitted, *arguendo,* that an election was as open to petitioner here as the Court merely assumed it to be in *Dahn* v. *Davis, supra.*

Finally, petitioner contends that the Virginia death statute (R. 10), upon which she relies,

creates a new and original cause of action (Pet. 27–29). She urges that the statute is not a survival statute, nor is the instant suit one to enforce a claim personal to the deceased nor to recover for any injury to him. Even conceding that petitioner could recover damages under the Virginia statute which did not originally inure to the deceased, nevertheless, such right merely goes to the quantum of damages and not to the right to maintain suit. The inescapable fact remains that a suit cannot be maintained under the Virginia statute unless "the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, * * * and to recover damages in respect thereof" (R. 10). Here, clearly, the deceased, if death had not ensued, could not maintain the action against or recover damages from the United States.

CONCLUSION

The decision below is correct and there exists no conflict. We respectfully submit that the petition for a writ of certiorari should be denied.

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